EMPLOYMENT TRIBUNALS

Claimant: Ms P Stevenson

Respondent: Iceland Frozen Foods Limited

Heard at: Manchester **On:** 3 October 2018

Before: Employment Judge Ross
Mr G Barker
Mr S Stott

REPRESENTATION:

Claimant: Mr H Ibraheem, Solicitor
Respondent: Ms H Barney of Counsel

A JUDGMENT on liability having been given orally to the parties on 3 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was a till operator for the respondent, a major supermarket. She suffered a fracture to her right shoulder in December 2017. She was absent from work until her employment was terminated by reason of her incapacity in November 2017. She brought a claim for unfair dismissal pursuant to s.94, s95 and 89 Employment Rights Act 1996. She also brought a claim that her dismissal was unfavourable treatment pursuant to s.15 Equality Act 2010. She brought a claim that there was a failure to make reasonable adjustments pursuant to s21 Equality Act 2010.

2. There was a case management hearing before EJ Porter on 29 May 2018. At that stage the issues were not finalised.

3. By the time of the hearing the respondent had conceded that the claimant was a disabled person by reason of a shoulder injury from 1 August 2017. It agreed it had knowledge of the disability from that date. At the outset of the hearing the issues were discussed and identified.

4. We heard from the claimant. For the respondent we heard from Ms Ashton, HR Manager and Mr P Knott, Store Manager.

Facts

5. We find the following facts. The facts between the parties were largely undisputed.

6. The claimant suffered a fracture to her right shoulder in December 2016. She underwent an operation in February 2017 which put pins and plates into her shoulder and she seemed to be improving but unfortunately, by July 2017, the pain had increased considerably again, and we rely on the Occupational Health report and the disability statement for this information. The claimant was referred back to her surgeon with an appointment on 29 August 2017 and there was a possibility raised at that time that it was likely the metalwork may need to be removed, and the claimant was placed on a waiting list for an operation to do this.

7. The claimant was concerned about the length of the delay until the operation could take place and so she approached a different consultant to try and expedite the operation: she saw that consultant on 9 October 2017, who said that the facture had not fully healed and suggested a delay before the operation could take place. We know that the claimant subsequently had the operation in March 2018.

8. The claimant sent in fit notes regularly during her absence from work and we note that although GP fit notes have several boxes on them where the doctor can tick if the patient is ready to go back to work or is suitable for adjustments, none of those were ticked in the claimant's case at any time. The fit notes always said that she was unfit for work.

9. We find that it is not clear what the date of the final fit note was which was before the respondent at the time of dismissal. Mr Knott expressly said in his statement that it was the fit note for September at page 114 which was issued on 28 September for a month which states " fractured clavicle awaiting surgery". We accept Ms Ashton's evidence when she told us she believed she had the most recent fit note available. However we find it is unclear whether she did actually have the fit note covering the absence at the point of dismissal because the very brief notes of the dismissal hearing do not make it clear what were the documents before her, the dismissing officer at the relevant time. Within the GP records supplied for this hearing the GP records that a fit note was issued on 27 October to 30.11.17 stating the claimant was not fit for work.P179 and at p211.The reason for absence is "preoperative".

10. There is no dispute that the claimant was invited to a dismissal hearing on 10 November, and there is no dispute that prior to that there were very regular welfare meetings before this, initially with Mr Knott and then from June with Ms Ashton when she took over responsibility for managing the claimant's absence. There is no dispute that the claimant was referred to Occupational Health on 19 July. She attended on 27 July and the report was issued on 1 August. The key points we find in this report was that as well as detailing the nature of the claimant's injury the Occupational Health doctor recorded that the claimant had an appointment with her consultant due on 29 August and he noted that the claimant was probably protected under the Equality Act and further treatment was planned. The Occupational Health

Report suggested that the claimant be re-referred back when she had seen her specialist There is no dispute either that that never happened.

11. We find there was had been some discussion at the meetings in March and April between the claimant and Mr Knott about possible reasonable adjustments. We find that was quite soon after the claimant's first operation relatively speaking because that had happened in February. Unfortunately, the notes of the meetings which were put on the respondent's Nexus system are not very clear about what exactly was discussed. They are rather scant notes, and understandably memories have faded since that time, but what is not disputed is the claimant's GP never suggested that the claimant was actually well enough to return to work with any reasonable adjustments or amended duties, and the Occupational Health Advisor who saw the claimant in August was very clear that there were no adjustments that were suitable at that time.

The issues

Discrimination pursuant to s.15 Equality Act 2010

12. The respondent concedes the claimant was a disabled person from 1 August 2017 and had knowledge of disability from that date. Did the respondent treat the claimant unfavourably because of something arising in consequence of disability? The "something" relied upon by the claimant was her absence from work on long term sick leave. If so can the respondent show the dismissal was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments pursuant to s21 Equality Act 2010

13. What is the provision criteria or practice "PCP" relied upon by the claimant? Did it put the claimant at a substantial disadvantage in relation to a relevant matter? Did the respondent take such steps it was reasonable to have to make to avoid the substantial disadvantage? Did the respondent have knowledge of the disability and of the substantial disadvantage?(The respondent concedes disability and knowledge of the condition from 1 August 2017.)

14. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL.

15. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 524 CA. The Tribunal also had regard to paragraphs 4.25-4.30 and 5.11-12 of EHRC Code of Practice.

16. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT, O'brien v Bolton St Catherine's Academy 2017 ICR 737 CA and City of York Council v Grossett 2018 IRLR 746

17. We had regard to to Home Office v Collins 2005 EWCA Civ 598 referred to us by the respondent's counsel.

Unfair Dismissal pursuant to ERA 1996.

18. What was the reason for dismissal? The respondent relied on capability (ill health). Did the respondent act reasonably in treating the claimant's capability(ill-health) as a ground for dismissal? In particular did they consult with the employee? Conduct a thorough medical investigation? Consider other options such as alternative work? Was the dismissal procedurally fair? Was it within the band of reasonable responses of a reasonable employer?

Applying the Law to the Facts

19. We turn now to each of the different claims, and we remind ourselves that although the claimant has brought claims which relates to her dismissal, there are two different legal tests to be applied. The test we apply for an unfair dismissal pursuant to Employment Rights Act 1996 where we must not substitute our own view is different to the test that is applied in a disability discrimination claim. The test in each type of claim is described below.

20. We turn to the section 15 claim: was the claimant unfavourably treated because of something arising in consequence of her disability? We must answer four questions.

(1) What is the unfavourable treatment ?

(2) What is the "something" which arises in consequence of disability?

(3) Is the unfavourable treatment must be because of i.e. caused by, the "something" which arises in consequence of disability?

(4) Can the respondent show the unfavourable treatment is a proportionate means of achieving a legitimate aim?

21. There is no dispute that the unfavourable treatment was the claimant's dismissal. There is no dispute that the "something arising" was her long-term absence from work on sick leave due to her shoulder injury. The next question is: was the claimant dismissed because of the "something arising", and again the answer is yes. The claimant was dismissed because of her long-term absence from work. That absence resulted from her disability (her shoulder injury.) We rely on Ms Ashton's letter of dismissal where she explains the reason for dismissal is the claimant had been absent for ten months, a long term absence.

22. The heart of the section 15 claim is in the last question to be answered: can the respondent show that the dismissal was a proportionate means of achieving a legitimate aim? We remind ourselves that the burden is on the respondent to show us this.

23. The respondent relied on the legitimate aim as being the requirement of its employees to provide regular and reliable attendance at work; that aim was identified in the Response to this case at paragraph 27. Having accepted that that is a legitimate aim we must look at whether dismissing the claimant on 13 November 2017, was a proportionate means of achieving that aim, namely the requirement of its employees to provide regular and reliable attendance at work. We are not satisfied that the respondent has discharged that burden.

24. We remind ourselves of the guidance in EHRC in particular 5.12. *"It is for the employer to justify the treatment.They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*

25. We turn to the rationale for dismissing the claimant at the point she was dismissed in November. Ms Ashton told us that one of the reasons she dismissed at that point was that there were operational difficulties caused by the claimant's absence. The Tribunal finds, and indeed it was not disputed, that Store Manager, Peter Knott had left the store where the claimant had worked, in September 2017. Ms Ashton agreed that she had not discussed the staffing levels or any issues arising from staffing levels or resulting problems caused by the claimant's absence, with the new manager. We find some time had clearly elapsed between the situation as it was when Mr Knott was there, prior to September 2017 and when the claimant was dismissed in November 2017. We are not satisfied Ms Ashton had up to date information about staffing levels at the claimant's store when she dismissed the claimant.

26. Ms Ashton told us that the respondent found it generally difficult to recruit temporary staff, but the Tribunal finds that is not consistent with the specific evidence of Mr Knott in Tribunal about the store where the claimant worked. When questioned he stated that he had been able to recruit a temporary employee in August. When asked about covering the claimant's absence he also stated that other staff at the store welcomed working additional hours because they were on a minimum hours contract of 7.5 hours per week. He told us that at that store some of the employees particularly welcomed the chance to work additional hours to pay nursery fees. The Tribunal is not satisfied the respondent has shown us that it was finding difficulty in covering the claimant's absence.

27. We are slightly puzzled by the respondent's evidence that it was so difficult to recruit staff. When asked about how the respondent sought to recruit additional temporary staff Mr Knott said it was the practise to advertise in the shop window, which again the Tribunal thought was surprising. If there was real difficulty in recruiting temporary staff, there might be other more successful methods of recruitment.

28. Our final concern in relation to the respondent satisfying us on this point is that there was no reference to staffing levels in the notes of the meeting when the claimant was dismissed. There was no detailed information about staffing in the evidence of Ms Ashton. We were told about the number of employees who worked in that store, but it was not really clear why there was a very real problem for that store in relation to covering the claimant's absence such that they could not keep the claimant "on the books "any longer when staff in the store were willing to work additional hours.

29. We heard no evidence on cost and perhaps that is not surprising because the cost cannot be a reason on its own for discriminatory treatment. We noted the claimant told us that she was in a no pay situation having exhausted her sick pay and we note that the respondent is a very large employer, a large retailer employing 22,500 people.

30. When considering the proportionate means of achieving the legitimate aim, we had regard to the nature of the meeting that led to the claimant's dismissal..

31. We find the meeting took place on 10 November and the notes record that it started at 10.00am and concluded ten minutes later at 10.10am, which is an extremely brief meeting to terminate an employee's employment who has been employed by the business for 5 years. There is no reference in the notes to the Occupational Health report and no explanation as to why the claimant was not referred back to Occupational Health as the Occupational Health Advisor had suggested.P.133. There was no specific reference to the claimant's up-to-date fit note. There was no discussion about alternative roles or adjustments or the reasons why the respondent thought that was not suitable given the information before them.

32. For all those reasons we are not satisfied the respondent discharged the burden of proof to show that dismissing the claimant in November 2017 was a proportionate means of achieving the legitimate aim of regular and reliable attendance at work .We find the proportionate response could have been achieved by referring the claimant back to Occupational Health as the doctor had suggested, and the Occupational Health doctor may or may not have advised keeping the claimant "on the books" for a longer period of time, until she had undergone her second operation and become fit to work.(There is no dispute the claimant is now working in a similar role as a till operator now for another retail employer.)

33. We turn to the reasonable adjustments claim. The first issue for the Tribunal is to identify the provision, criterion or practice, "PCP". We find that the provision, criterion or practice relied upon by the claimant as defined was not applied by the respondent

34. We turn to the PCP as defined by the list of issues document supplied by the parties and referred to at the outset of the hearing. The PCP was listed as "the respondent's requirement for consistent attendance at work, the respondent's requirement for the claimant to work on tills only and the respondent's requirement for the claimant to provide a likely return to work date."

35. We find the PCP is factually incorrect because the respondent had tolerated the claimant being absent from work for a period of many months so we are not satisfied they applied a requirement for consistent attendance. We find the respondent did not apply a requirement for the claimant to work only on tills: we heard evidence in this case that although the claimant mainly worked on tills she also stacked shelves and did some light cleaning as part of her job. We find that the requirement for the claimant to provide a likely return to work date is factually incorrect too because although the claimant was asked about a likely return we are not satisfied it was anything so onerous as a provision, criterion or practice. So we find the claim for reasonable adjustments fails at that stage.

36. However if we are wrong about that we turn to substantial disadvantage. The claimant was unable to return to work, work on the till only or provide a likely return date because of her illhealth following her shoulder injury.

37. We turn to the last issue. Did the respondent make such adjustments as was reasonable to make? The answer is yes. The claimant worked in a manual job. She fractured her shoulder and was in a great deal of pain , and required 2 operations. Neither the OH advisor in August nor the claimants GP considered the claimant was well enough to return to work in an adjusted the role. Although the claimant said in evidence she thought she could have done another job, given the manual nature of her job and the serious pain she was in at the relevant time, we find she is mistaken. (See her disability impact statement for her limitations)

38. For the sake of completeness and in terms of being fair and the overriding objective, we find the real PCP applied by the respondent was the requirement for the claimant to do her full duties of a store colleague. We find that would put the claimant at a substantial disadvantage in relation to a relevant matter because her shoulder injury meant she could not do those duties as certified by her GP and the Occupational Health doctor.

39. The last question is: did the respondent make such adjustments as was reasonable to have to make to avoid the disadvantageous effect? Again the answer to that question is yes, because we find there were no adjustments that the respondent could have actually made up to the point where the claimant was dismissed because although the claimant felt she was well enough to return to work, the Occupational Health doctor clearly did not agree in August and her GP never agreed. The claimant had suffered a fracture to her shoulder and it would be a foolhardy employer who allowed her to return to work when there was no medical advice to say that she was fit to do so or a suggestion of adjustments, so in those circumstances the reasonable adjustments claim must fail.

40. For the sake of completeness in relation to the disability, we note the respondent agreed the claimant was a disabled person within the meaning of the Equality Act 2010 and knew the claimant was disabled from the date of the receipt of the Occupational Health Report on 1 August 2017. We do not find that the claimant was disabled before that date or that the respondent could have known of it. Certainly in the early part of the year, although the claimant had suffered a fracture and was absent from work there was no clear indication in the early months that unfortunately her recovery would be prolonged. The claimant was assaulted in December 2016 which caused a fracture to her right shoulder. Initially she was placed in a sling but by February 2017 an operation had taken place to pin and plate the shoulder. Unfortunately, the claimant continued to suffer with severe pain and restricted movement and it became clear that the operation had not been a success. She was referred back for further medical opinion which noted the fracture had not fully healed and in March 2018 she had a second operation to remove the metalwork. She has been able to work in a similar role in retail since obtaining a new job in May 2018.

41. We find the claimant was disabled from 1 August 2017 and we are satisfied the respondent had knowledge of disability at that date and not before.

42. Now we turn to deal with the other type of claim which is the “ordinary” unfair dismissal case.

43. The first issue is: what was the reason for dismissal? The respondent relied on capability (ill health). We are satisfied the respondent has shown the reason the claimant was dismissed was because she had been absent from work since December 2017 due to ill-health and accordingly capability was the reason for dismissal.

44. We turn to the next issue: Did the respondent act reasonably in treating the claimant’s capability(ill-health) as a ground for dismissal? In particular did they consult with the employee? Conduct a thorough medical investigation? Consider other options such as alternative work?

45. At this stage we remind ourselves it is not what we would have done which counts. It is whether a reasonable employer of this size and undertaking could hve dismissed this claimant at the stage it did. It is not for us to substitute our own view.

46. We have to say that we found Ms Ashton and Mr Knott to be honest witnesses and we accept that Ms Ashton, when she dismissed the claimant believed she was unfit to return to work and that the business could not reasonably wait any longer. Ms Ashton relied on the Occupational Health report dated 1 August 2017. It stated the claimant was not fit for work and so no adjustments could be suggested at present but advised “she be re-referred back to Occupational Health when she has seen her specialist and further treatment has been planned. We will then be able to advise.”. Ms Ashton did not follow this recommendation from the OH advisor to refer the claimant back.

47. Her reason for this was that the claimant had told her at a meeting on 4 September 2017 that she had seen her consultant again at the end of August and it had been decided she would have a further operation to remove the pins and plate in her shoulder but this could not be done until the bone in her shoulder had healed. (P136). Ms Ashton noted the claimant was due to see her consultant in December to see if the bone had indeed healed so the operation could be done or whether the operation would be delayed.

48. At the brief dismissal hearing the claimant confirmed she was due to see her consultant in December and Ms Ashton therefore noted that nothing had changed, the claimant remained unfit for work and it was unclear if or when she would be fit enough to return.

49. There is no dispute the respondent held regular meetings with the claimant to consult her about her health on 20 Febrauary,20 March,28 April,26 May,28 June, 31 July, 4 September and the dismissal hearing on 10 November.

50. We find there was no discussion of alternative work at that final meeting but that is unsurprising given that the OH advice was that the claimant was unfit to work and the claimant’s evidence was that she remained unfit, awaiting an appointment with her consultant in December.

51. Was the dismissal procedurally fair? Was it within the band of reasonable responses of a reasonable employer?

52. The respondent consulted the claimant regularly and she had the opportunity to attend a dismissal hearing. Although the dismissal hearing was very brief, the claimant had the opportunity to state her case. The respondent offered the claimant an appeal, which she failed to take up. We find they were operating a procedure which a reasonable employer of this size and undertaking could operate.

53. The key issue was whether the failure of Ms Ashton to refer the claimant back to OH and therefore wait a little longer before dismissing her renders this dismissal unfair. We remind ourselves once again it is not what we would have done which counts. It is whether a reasonable employer in a large retail business could be expected to wait any longer.

54. We accept Ms Ashton considered the fact the claimant had been absent since December 2016 and there was, based on the information the claimant gave her on 10 November, no clear indication what would be said by her consultant when she saw him in December. There was no indication of any possible return to work date. We find that the respondent operates in a busy retail environment. Ms Ashton told us she was not aware of an employee remaining "on the books" for a period of more than 12 months. We therefore find that dismissal was within the range of reasonable responses.

55. So for all of those reasons we find that the ordinary unfair dismissal claim fails.

Employment Judge Ross

Date 20 November 2018

REASONS SENT TO THE PARTIES ON

22nd November 2018

FOR THE TRIBUNAL OFFICE